91-1336

Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

LEONARD REICHLIN, Petitioner,

v.

WILLIAMS NOVACK, AND HANSEN et,al, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE WASHINGTON STATE SUPREME COURT

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Petitioner Pro Se

Questions Presented

1. By reliance on the code of Professional Responsibility, (*) did the Washington State Court deny the petitioner both due process of law, and equal protection of the laws, under Section 1. of the Fourteenth Amendment to the U.S. Constitution?

2. Can Division I of the Washington State Court of Appeals decide an issue of credibility without abuse of its discretion in deciding those issues reserved for the jury finder of fact?

(*) Superseded by Rules of Professional Conduct.

3. Jury demand was made on multiple claims in State Court complaint against defendant lawyers, who prayed for dismissal of all claims at summary judgment; the court found, (whether correctly or incorrectly), that some claims fail. Is dismissal of all claims repugnant to Amendment VII of the U.S. Constitution when adjudication of those other claims require jury as finder of fact?

4. To the detriment of petitioner, was the trial and appellate courts selective focus on the code of Professional Responsibility, (now RPC), while ignoring the common law, repugnant to Article I Section 10 [1] of the U.S. Constitution? (*)

*. This issue was raised in lower courts, but not as a Federal question; the constitutional repugnance of the Rules of Conduct has only now become apparent to the petitioner. (to be briefed on request of this court)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

No.

LEONARD REICHLIN, Petitioner

v.

WILLIAMS, NOVACK & HANSEN, a corporation;
PARKER WILLIAMS and JANE DOE WILLIAMS,
husband and wife;
DOUGLAS GRAHAM and JANE DOE GRAHAM,
husband and wife;
DAVID R. RILEY and JANE DOE RILEY,
husband and wife;
THOM H. GRAAFSTRA and JANE DOE GRAAFSTRA,
husband and wife;
EDWARD J. NOVACK and JANE DOE NOVACK,
husband and wife; and
EDWARD D. HANSEN And JANE DOE HANSEN,
husband and wife,

Respondents,

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PETITION FOR A WRIT OF CERTIORARI
TO THE WASHINGTON STATE SUPREME COURT

The petitioner Leonard Reichlin respectfully prays that a writ of Certiorai issue to review the judgment of the Snohomish County Superior Court granted on November 9th, 1988, and reconsidered on December 15th, 1988, the Opinion of Division I of the Court of Appeals of Washington State filed September 17th, 1990, and the Petitioners Motion for Discretionary Review in the Supreme Court of the State of Washington denied March 5th 1991.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC paragraph 1257 (3).

The state court upheld or refused to review the action by the trial court on the grounds that the trial courts decision offends nether federal nor state law. (*)

Petitioner Plaintiff Leonard Reichlin filed action against WNH in Snohomish County Superior Court, Everett Washington, Trial Court granted Summary Judgment on November 9th 1988 and Denied Reconsideration on December 15th 1988. The Supreme Court of Washington denied direct review on March 8th 1990.

(*) Petitioner has concurrently filed a request with the Supreme Court of the State of Washington for certification that a federal question was raised and decided .

Division I of Washington State Court of Appeals affirmed trial court decision on September 17th 1990/ Supreme Court of Washington declined discretionary review March 5th 1991.

STATUTE INVOLVED

28 USC paragraph 1257 (3)

Constitutional Provisions

Amendment VII right to jury trial

Amendment XIV Section 1.

right to due process of law

right to equal protection of the laws.

Article I Section 10 [1]

(This issue to be briefed on request of the Supreme Court.)

Statement of the Case

A. Facts. Principals of the Williams, Novack and Hansen law firm (hereinafter referred to as WNH) Edward Novack and Edward Hansen, along with other investors had founded Frontier Bank; Novack and Hansen had continuously served as directors of this local bank. Novack and Hanen took Leonard and Judy Reichlin as clients (hereinafter Reichlin) but failed to disclose any conflict of interest to Reichlin who had extensive borrowing from same bank.

WNH was general counsel for Reichlin; the clerk;s papers reflect representation on ten separate and distinct matters. (CP 162, 163, 192, '93, 194, 195, 196, 197, 198, 199, 200, 201, 202).

When Frontier Bank became involved in a dispute with Reichlin concerning repayment of loans and the collateral securing those loans, WNH launched a blitzkrieg foreclosure action against their own clients Reichlin, in favor of Novack and Hansen's ownership interest in Frontier Bank. Reichlin contended that through WNH's unlawful acts the WNH defendants also precipitated an unnecessary and disastrous Chapter 11 filing, though Reichlin refused to follow with the customary Chapter 7. (CP 148, 149, 150, 151, 152, 153, 154)

B. Judgment of Trial Court. (November 9, 1988)

The Snohomish County Superior Court granted total summary Judgment dismissal to the WNH defendants, accepting a contested affidavit and the WNH argument that it was not lawyers for Reichlin. Trial by jury denied.

The Court accepted oral argument as evidence, and ruled without benefit of a complete file; it also considered a WNH memorandum filed 5 hours after the hearing.[1] It ruled on an amended complaint which was not before the court, (as a physical impossibility), and signed the summary judgment order before receipt of invited written argument, without presentation. There were other irregularities. (CP 87,88,89) (Reconsideration denied December 15th, 1988)

C. Petition for Direct Review by the Washington State Supreme Court was treated as a petition for transfer from the Court of Appeals; petition denied March 8th, 1990, review heard by Court of Appeals.

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[1] The WNH memorandum, 21 days late, raised for the first time a defense against Reichlin's Consumer Protection Act claim.

D. Decision of Court of Appeals (Sept. 17th 1990).

Division I of the Court of Appeals in affirming the trial courts grant of summary judgment to the moving party WNH again denied petitioner trial by jury. The opinion addressed several of the items in the complaint; petitioner believes careful reading of opinion, even without other documents, will provide support for writ.

E. The petitioners motion for discretionary review was denied by the Washington State Supreme Court on March 5th 1991.

REASONS FOR GRANTING WRIT.

I. ORIENTATION

On a smaller than average star, a series of amazing self sustaining nuclear fusion reactions occurred, [2] and is expected to continue for awhile. Because of the tremendous quantity of that solar energy, the first two planets were too hot' the fourth because of its distance from the source, was too cold. The third planet like the "little bears porridge" was just right. On the third planet from that star, an interesting organism, Homo Sapiens, came into being; through it has proved to be wasteful and aggressive, some say this species should be preserved.

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[2] First described by Hans Bethe in 1930's

Several hundred years ago, On the eastern side of the middle of the North American continent, on same planet, the human population of a group of states, having displaced and or mingled with the native inhabitants became unified under a system of laws and Government thought by many to have value. Those responsible for generating that first document known as the Constitution, took time off from work, (considered a personal sacrifice in those days). Their neighbors probably laughed and their creditors were no doubt displeased. They did have the benefit of good educations and the example of many prior experiments in government. Still...it must have been one long seminar.

As the complexity of law developed, a group of persons became specialized in its learning and administration; and because of the power that comes with the knowledge of that law, these "lawyers" were charged with a higher than usual conductance of ethical behavior according to the standards the country known as the United States.

Now, unfortunately, many concerned citizens residing in the middle portion of the North American Continent and its Territories believe that their country is in a cycle of moral decay. There is a parallel decline in esteem for lawyers which has negatively impacted the respect of the population for the law and government.

Additionally, a significant portion of the population suspects that as a pragmatic matter, attorneys are immune from civil tort liability, not only in their professional capacity as lawyers, but in ordinary commerce as well.

II. INTRODUCTION

The Core of the Case.

Reichlin v. WNH is not a challenge to a lawyer's right to sue a client for legal fees, or a bank's property rights (to foreclosure)

Reichlin v. WNH asks the U.S. Supreme Court to determine if attorneys with multiple representation of existing clients, can abandon those clients, lawfully immediately sue them on behalf of a bank in which same lawyers have both substantial ownership and management responsibility, and properly collect ample fees for those acts? (without violation of demanded federal rights)

III. ERRORS AT LAW BREACHED CONSTITUTIONAL RIGHTS

The Washington Trial and Appellate Courts by improper grant and affirmation of summary judgment denied both right of jury trial and due process.

A. It is true that the first clause of the 7th Amendment leaves the states to regulate trials in their courts; Edwards v. Elliott 21 Wa 11 532 22 L Ed 487, however, Article I 21 of the Washington State Constitution and Washington CR 38 preservers the Jury Trial of right.

The decision was repugnant to both state and federal law. see Justice O'Conner, Our Judicial Federalism, Stern Gressman Shapiro p 175 (2)

B. The prohibitions of the 14th Amendment, against depriving any person of life, liberty, or property without due process of law, or denying the equal

protection of the laws, extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. Scott v. McNeal. 154 US 34, 14 S Ct 1108

IV. REICHLIN V. WNH IS NOT JUST A MALPRACTICE CASE

A. Multiple Claims

In the complaint in Snohomish County cause No. 87-2-04013-3, plaintiff Leonard Reichlin alleged **LEGAL NEGLIGENCE AND BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, NEGLIGENCE PER SE AND CONSUMER PROTECTION VIOLATION.**

The Trial Court and the Court of Appeals focused on legal malpractice, dismissing and affirming.

Under CR 56 (c) (identical to the federal rule) the Trial Court could not even sustain summary judgment on the legal malpractice issue, yet it dismissed all claims.

It is well established in Washington law that the summary judgment procedure is designed to avoid useless trial, but that were there is a genuine issue as to any material fact in the litigation, a trial is not useless, but is absolutely necessary. Moor v. Pacific Northwest Bell, 34 Wash. App. 448, 456. (1983) The moving party, respondents WNH, had the initial burden to prove by uncontradicted facts that there is no genuine issue of material fact. Rathlon v. Columbia Pacific Airlines, 30 Wash App. 193, 201; Ohler v. Tacoma Gen. Hosp., 921 Wn 2nd 507. (1979) When different inferences may be drawn from evidentiary facts as to ultimate facts, summary judgment is not warranted, Weisert v. University Hospital, 44 Wash. App. 167. (1986)

B. CR 56 (c) Mandates Written Motion and Support.

WNH's failure to answer provided Reichlin with entitlement under CR 15 (a) to amend the complaint with out leave of the court. Thus it was a physical impossibility for WNH to pray for relief, much less support dismissal, on those additional claims in the amended complaint; the trial court erred in dismissing those additional claims on a procedural basis.

V. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THE STATE SUPREME COURT. (Credibility)

See Court of Appeals decision page ~~19,20~~ 33d

..."this court can make a decision about credibility"

Petitioner Reichlin respectfully disagrees as does the State Supreme Court in Ammend v. Bell 89 Wn 2nd 124 at 129 (1977) also 570 P 2d 138 (1977)

> ..." This is but another way of saying that there must be no genuine issue of credibility. Second, the court should not resolve a genuine issue of credibility at a summary judgment hearing. If such issue is present, the motion should be denied. An issue of credibility is present if there is contradictory evidence or the movant's evidence is impeached. Balise v. Underwood, 62 Wn 2nd 195. 381 P 2d 966 (1963)

In deciding an issue of credibility, the Court of Appeals decided an issue of fact. The credibility of Graffstra's affidavit was challenged by the Verified Complaint, Reichlin's several declarations and the Dickson Affidavit, (a former WNH attorney who is neutral in this case), and the WHN billings sheets plus Riverside's account records.

This Court of Appeals decision is also in conflict with the Supreme Court in Dougert v. Pappas 104 Wn 2nd 254 at 257. 704 P. 2d 600 (1985)

> ..."In most instances the question of cause in fact is for the jury. It is only when the facts are undisputed and inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that this court has held it becomes a question of law for the court." relying on Peterson v. State 100 Wn 2nd 421.

VI. DETERMINATION OF AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Typical and common issues in most legal malpractice cases are whether or not an attorney: failed to defend, (Sherry v. Diercks, ~~29 Wn App. 433 P. 2nd 1336~~* chose inappropriate legal strategy (Halverson v. Fergeson, 46 Wn. App. 708, 735 P. 2nd 675) or mishandled someone else's mail (Delta Equipment Construction Co. v. Royal Indemnity Co. 186 S.2nd 454, La. App. (1986). By contrast, the actions of the WNH attorneys against the REichlins were overt unlawful purposeful acts, in violation of statute, which injured and damaged their own clients, not some small question of neglect or legal strategy. See Hangmen Ridge v. Safeco Title 105 Wn 2nd 778, (1986)

* Sherry v Diercks 30 Wn. App. 763, 764, P 2d 122 (1981)

This case warrants review by the Supreme Court because it deals with the duty of attorneys to their clients, their professional conduct, and involves fundamental and urgent issues of public import. The action of the WNH attorneys not only impacts by example the comportment of other lawyers, but as outlined in the preamble to the Rules of Professional Conduct, it also affects the orderly administrations of the law, and the behavior of the entire population in its respect and obedience to the law.

VII. ALTRUISTIC CODE - INADEQUATE LAW

Whether by its statutory existence or by virtue of Washington's courts preferential reliance thereon, the Rules of Professional Conduct has created a class of persons who as a pragmatic mater are immune from civil tort liability, not only in their professional capacity as lawyers, but in ordinary commerce as well.

Judicial and legislative acts of a state, hostile in their purpose or mode of enforcement to the authority of the national government, or which impair the rights of citizens under the Constitution of the United States, are invalid and void. Taylor v. Thomas 22 Wall 479.

VIII. ARTICLE I SECTION 10 [1]

(The Fourth Question)

The selective focus on the Rules of Professional Conduct, while ignoring the Common Law, is repugnant to Article I Section 10 [1].

> **"No state shall ... pass any Bill ... or law impairing the obligation of contracts ... (1)**

The Rules of Professional Conduct, a part of Washington State Law, has a magnificent preamble, but no enforcement power for the benefit of ordinary citizens, and serves as a hurdle to impair recovery under the common law

Petitioner did not raise this issue in the lower court as a Federal Question but is enthusiastic and willing to brief this matter upon expression of interest by the Supreme Court.

IX. CONCLUSION

Whether or not an obscure farmer/chemist/contractor in the Northwest corner of the middle country obtains financial recovery via the courts and pays his abused patient creditors may be of little significance.[3] It is certain however that the ethical standards of the officers of U.S. courts will impact the behavior of the entire population in it's respect and obedience to the law. There even exists the possibility of a positive behavioral shift in the most wasteful people to ever inhabit the third planet. Such an event would no doubt increase the longevity of the present law and government, and perhaps even the species.

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[3] Except to the 135 creditors who have been waiting since 1984.

A writ of certiorari should issue to the Washington State Supreme Court.

Respectfully submitted,
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Everett, WA 98201

APPENDIX A

ORAL RULING BY Richard L. Pitt, DEPARTMENT __, SNOHOMISH COUNTY SUPERIOR COURT, STATE OF WASHINGTON, ON November 9, 1991, IN REICHLIN, ET AL. V. WILLIAMS, NOVACK, HANSEN, ET AL., CAUSE NUMBER 87-2-04013-3

THE COURT: I'm not arguing now. I'm just going to tell you what the decision is. I heard your argument and now you have to listen to me for a minute.

MR. REICHLIN: Sorry, Your Honor.

THE COURT: Incidentally, Mr. Reichlin, I want to say you've done a better job than 90 percent of the people who appear pro se so you've obviously done some work on this, but, under the rules, you now have to listen to me.

As pointed out by the plaintiffs, if there's any evidence created by any of the affidavits that raises an issue of fact, then the Court must deny that motion for

summary judgment, but that issue of fact has to be raised by affidavit. That's the rules. Simply a claim of negligence against an attorney, without an affidavit, which raises a dispute, or raises an issue of fact is not adequate.

Beyond that, and in this particular case, if you look at the specifics; for instance, there's a complaint concerning the Salter matter; there's a complaint concerning advice concerning a bid which occurred prior to the attorneys representing the plaintiff at all, and the advice, according to the statement, was made in 1983. This suit is in 1987. Assuming that there was some improper advice, the statute would run on it, but there's no -- there is no issue raised because there is no affidavit from anyone competent to testify to that, that there was any -- that that advice was negligent.

And if you look at all these things; for instance, the allegation of a lack of lien policy, I didn't find anything in these affidavits that suggests any loss related to that, even if you assumed that there was inappropriate advice there.

With respect to the major claim, and that is that these -- I think there may be an issue of fact as to whether the law firm was considered to be the general counsel, if you want to call it that, of the plaintiff, but, again, there's no support for that by anything other than the statement of the plaintiff that they looked to this defendant for legal advice, and except for this talk about lien policy, nothing in the affidavits that suggests they went to the law firm for advice or that any advice they got was negligent.

There's a statement by the plaintiff

in the pleadings that there was negligence. The plaintiff has said that, and that's it. But the main basis why I think I should grant summary judgment is that the allegations of damage are related to the fact that the defendant Williams, Novack and Hansen withdrew; that the plaintiff then had to hire other attorneys; that those other attorneys gave them negligent advice as to bankruptcy, resulting in damages. In fact, Mr. Olney, who has the one affidavit submitted with respect to damages, says that the damages -- the only damages he talks about are those related to the bankruptcy, filing the bankruptcy, and it's not disputed that another law firm, unrelated in any way to Williams, Novack & Hansen, gave the advice, and, for that reason, in my view, that damage is not a proximate -- could not be -- the jury could not find that

that damage proximately resulted from the withdrawal by Williams, Novack and Hansen, and if this matter were tried and that were the only evidence submitted, I would have to direct a verdict to ave effect.

For that reason, I think that the Court is in a situation where a summary judgment with respect to Williams, Novack and Hansen only -- not the other defendants; they're not involved here -- but with respect to those, should be granted.

The primary reason, Mr. Reichlin, is because, in my view, under the undisputed facts here, there's no evidence on which a jury or a trier of fact could conclude that the withdrawal of the law firm was a proximate cause of your claimed damages. That's the main basis for it.

APPENDIX B

ORAL RULING BY Richard L. Pitt, DEPARTMENT ___, SNOHOMISH COUNTY SUPERIOR COURT, STATE OF WASHINGTON, ON December 15, 1991, IN REICHLIN ET AL. V. WILLIAMS, NOVACK & HANSEN, ET AL. CAUSE NUMBER 87-2 04013-3

THE COURT: What are reasons, their reasons -- for summary judgment, while it is true, as you have stated, Mr. Reichlin, denial of a summary judgment just means a trial, but what do you mean by "just means a trial"? The same issue would be presented at trial. That is, evidence, whether or not what you have submitted in this, a jury, could consider and the judge would do that even with a jury sitting right there or having been selected after days of trial and so forth.

The whole purpose of summary judgment is to eliminate a lot of undue

and unnecessary expense if it is a legal issue and not a factual one, and I went over I think everything you have raised. I can't think of anything before -- I thought I did and was quite clear in what my view was with respect to that.

On this question of whether or not notice of presentation was given, I think you were given notice of presentation. The whole purpose of that is to permit parties to argue the form of an order and you argued it in writing to me and both sides presented their view as to the form of order that I signed previously. I don't think that there was any problem there. I haven't been convinced that I was wrong, and maybe the Court of Appeals will do it, but I am satisfied that after considering all that -- and I did consider -- I recall specifically the amended complaint. I don't know that I can tell

you every affidavit that I considered, but I thought I certainly considered everything that was submitted to me, and there hasn't been any showing, if I hadn't had that affidavit, it would make any difference.

I am going to go ahead and deny this motion and enter the order as presented by Mr. Swartling.

MR. REICHLIN: Thank you, Your Honor.

THE COURT: You're welcome.

MR. SWARTLING: Thank you, Your Honor.

Whereupon the proceedings were concluded.

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

REICHLIN, ETC. Appellants, v. WILLIAMS, NOVACK & HANSEN, etc., et al., Respondents.	)	No. 23563-0 DIVISION ONE FILED: SEP 17, 1990

PEKELIS, J. -- Leonard F. Reichlin d/b/a/Riverside Roof Company, appeals the trial court's grant of summary judgment dismissing his legal malpractice and Consumer Protection Act claims against Williams, Novack & Hansen, and the trial court's denial of his motion for reconsideration. Reichlin contends that the trial court erred in determining there are no material facts in dispute and that WNH's conduct did not proximately cause his damages.

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1. FACTS

A. Williams, Novack & Hansen's Representation of Reichlin

In June of 1983, Leonard Reichlin, owner of Riverside Roof Co., met with Parker Williams and Thomas Dickson, members of the Williams, Novack & Hansen law firm (WNH).

In his affidavit, Reichlin contends that at this meeting, the parties discussed a broad range of Riverside Roof's legal and business matters, including collections, lien policies, and public work projects. Williams assured Reichlin that WNH could handle all of Riverside's legal matters. Williams told Reichlin "to put [his] faith in him and his firm, and the money in their trust account" and WNH would get started.

In his affidavit, Tom Dickson states that the purpose of the meeting was to secure Riverside Roof as a WNH client. The meeting focused on the merits of having a law firm to respond to a variety of business matters, rather than in-house counsel, which Reichlin perceived as the best way to serve his needs. The consensus of the meeting was that rather than hiring his own in-house counsel, Reichlin would have WNH represent him on an experimental basis. The parties did not enter into a formal retainer agreement.

Reichlin contends that he left the meeting with the impression that "if he did retain WH&N (sic), it would be on all corporate matters - a broad spectrum attorney-client relationship." WNH asserts that it represented Reichlin "on

two limited matters and did not have a duty to provide legal counsel regarding corporate financial issues."

Following the meeting, Williams sent Reichlin a letter. The letter stated in part:

> I will not bill you for that conference and will consider it as a conversation in which we were trying to get together a general plan for future proceedings. But I an assure you that either I or Tom or any of the other lawyers in the office stand ready to lend you a hand should you ever desire to call upon us.

Thereafter, in August of 1983, Tom Graafstra, an associate at WNH, worked on a collection case for Reichlin (the Stark case). Graafstra tried the Stark case in the spring of 1984. Reichlin alleges that he lost this case because Graafstra did not present crucial evidence which Reichlin gave him.

Graafstra also represented Reichlin in an unfair trade practices case against one of Reichlin's former employees (the Salter case). The case was originally scheduled for trial on February 7, 1984. Graafstra tried to settle the case. The proposed settlement terms required Salter to make a nominal payment to Reichlin. On March 30, 1984, Reichlin refused the proposed settlement because he claimed its terms favored Salter. Graafstra subsequently rescheduled the case for trial.

On May 1, 1984, Reichlin hired Kathleen Kelly as in-house counsel. He contends that because she was inexperienced, he thought she could not handle all of Riverside Roof's legal needs immediately. Reichlin expected Kelly's main responsibilities to involve

protecting new products and securing venture capital for their development. Reichlin assumed Kelly would take counsel from experienced law firms and also act as liaison between him and WNH. Reichlin asserts that Kelly did not take over any matters that WNH was litigating and that he continued to give WNH his legal business during her tenure.

On May 14, 1984, Graafstra met Kelly and they discussed the Salter case. In a subsequent conversation about the case, Graafstra recommended to Kelly that Reichlin accept the original settlement since the cost of trial would be higher than any judgment Riverside Roof could reasonably expect. In June of 1984, Graafstra wrote to Reichlin directly and recommended that he settle the Salter case and asked how he wished to proceed. In

July of 1984, Graafstra received a letter from Kelly informing him that she had recommended settlement to Reichlin. Kelly also advised Graafstra that she would be available to assist him in trial preparation.

In his affidavit, Graafstra states that he only represented Reichlin in the Stark and Salter matters. Graafstra contends that he did not advise Reichlin on general corporate or financial matters, and that other attorneys, including in-house counsel, advised Reichlin.

Reichlin's affidavit disputes this, contending Graafstra's work for Riverside Roof extended beyond these two cases. Specifically, he claims Graafstra represented them on a matter involving a bid on a public works contract for the Moses Lake School District (the Moses Lake

project), and that he performed general business counseling for him, including writing a non-compete agreement. Reichlin also contends that he requested guidance from WNH in establishing a lien policy to protect his interests and that WNH did some preliminary work on development of such a policy.

b. WNH's Withdrawal from Representation of Reichlin

On August 15, 1984, Edward Novack, a WNH partner, sent Reichlin a letter advising him that WNH would withdrawal as counsel in the Salter matter if he did not pay his outstanding balance as well as a retainer of $2,500 to cover anticipated trial costs.

On August 22, 1984, Graafstra filed a Notice of Intent to withdraw as counsel in the Salter case. Reichlin filed an

objection, but he did not appear at the hearing. The withdrawal became effective on September 5, 1984. (footnote: In April of 1988 the court dismissed the Salter case for lack of prosecution.)

Meanwhile, during the summer of 1984, Reichlin had fallen behind in his loan payments to Frontier Bank, Riverside Roof's main creditor. Frontier Bank was also a longstanding client of WNH. Sometime shortly before August 21, 1984, Frontier Bank contacted Douglas Graham, a WNH attorney, and told him that Reichlin owed the bank over $325,000. The bank explained that it had worked with Reichlin for several months in an attempt to keep him in business, but Reichlin's financial position had worsened and he appeared to have no source of funds.

Under the terms of Reichlin's

security agreement with the bank, if he defaulted, Frontier Bank could require him to turn over his collateral. Frontier Bank asked Graham to accompany its employees to Riverside Roof to request the collateral. The bank told Graham that it had advised Reichlin that Frontier Bank would visit Riverside Roof on August 21, 1984.

On August 21, 1984, Graham and Frontier Bank employees spoke to Kelly. Kelly stated that Riverside Roof would not voluntarily turn over the secured property and that Frontier Bank would have to enforce its rights in a judicial proceeding. Reichlin contends that during that visit he learned for the first time that WNH represented Frontier Bank. It was not until 1986 that he learned that Novack and Hansen, members of WNH, had a

financial interest in Frontier Bank and had sat on the bank's Board of Directors.

On August 24, 1984, Graham, on behalf of Frontier Bank, filed an action against Reichlin and Riverside Roof and obtained a temporary restraining order enjoining Reichlin from disposing of the property. In his affidavit, Graafstra states that during the course of his representation of Riverside Roof, he did not become privy to any knowledge which could have helped WNH represent Frontier Bank in this collection action.

Reichlin contends that once he discovered that Frontier Bank had obtained a temporary restraining order, he hired Harold Weinberg of Lewicki & Weinberg to represent him in the action. Weinberg advised him to file under Chapter 11 of the United States Bankruptcy Code.

Reichlin followed this advice and filed for bankruptcy. Reichlin alleges that he suffered personal and business losses as a result of the subsequent bankruptcy proceeding.

C. The Lawsuit

On August 24, 1987, Reichlin filed a complaint against WNH and its individual attorneys alleging damages resulting from the foreclosure proceeding; and, against Lewicki & Weinberg and its individual attorneys alleging damages resulting from the bankruptcy proceeding.

In September of 1988, WNH moved for summary judgment on all claims against it. On November 7, 1988, 2 days before the summary judgment motion hearing, Reichlin filed an amended complaint. The amended complaint added details to the original claims and alleged several new claims.

On November 9, 1988, the trial judge heard oral argument and granted WNH's motion for summary judgment. In its oral decision, the trial judge concluded that "under the undisputed facts here, there's no evidence on which a jury or trier of fact could conclude that the withdrawal of the law firm was a proximate cause of [Reichlin's] claimed damages."

On December 6, 1988, Reichlin filed a motion for reconsideration. After hearing oral argument on the motion, the trial court entered an order denying the motion for reconsideration and confirming the order granting summary judgment dismissing all claims against WNH.

On January 5, 1989, Reichlin filed a motion to vacate the summary judgment. The trial court denied this motion on February 17, 1989.

Reichlin brings this timely appeal.[1]

II. Claims on Appeal

A. Procedural Errors

Reichlin first claims that WNH's failure to answer either his complaint or his amended complaint precludes summary judgment. He is mistaken. A defendant is not required to answer before moving for summary judgment. Duffy v. King Chiropractic Clinic, 17 Wn.App. 693, 702, 565 P.2d 435 (1977). Reichlin also argues that WNH waived any statute of limitations defense to his claims because it did not affirmatively plead the defense in an

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1. WNH argues that this appeal is untimely and should be dismissed. The trial court, sitting in the Island County Courthouse in Coupeville, signed the order denying the motion for reconsideration on December 15, 1988. WNH then sent the order from Seattle to the Snohomish County Superior Court. It is not clear from the record when the Snohomish County clerk recieved the order, however, the record shows that the clerk filed the order on December 19, 1988. Thus, Reichlin's appeal, filed on January 17, 1989, is timely.

answer. Here, after Reichlin filed his complaint, WNH filed its summary judgment motion. Subsequently, two days before oral argument on the motion, Reichlin filed his amended complaint. Thus, WNH properly raised the statute of limitations defense on oral argument and was not required to plead it in an answer.

Reichlin also contends that the trial court erred in dismissing the claims he alleged in his amended complaint, filed two days before the summary judgment hearing, because the amended complaint was not properly before the trial court. This claim too is without merit. Under CR 15 and CR 56, Reichlin's amended complaint was properly before the trial court. Moreover, Reichlin argued the claims to the trial court and the court's order on summary judgment specifically includes the

amended complaint among the documents it considered.

B. Summary Judgment

Reichlin next contends that the trial court erred in granting summary judgment dismissing his legal malpractice and Consumer Protection Act claims and in denying his motion for reconsideration. WNH maintains that the trial court did not err because no material facts are in dispute and it is entitled to summary judgment as a matter of law.

This court reviews summary judgment motions de novo. Del Guzzi Const. Co. v. Global Northwest, Ltd. Inc., 105 WN.2d 878, 882, 719 P.2d 120 (1986). This court may sustain the trial court's ju'gment on any ground established by the pleadings and supported by the record. Bremmeyer Excavating, Inc. v. McKenna, 44 Wn. App.

267, 268, 721 P.2d 567 (1986).

Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions demonstrate that there is no genuine issue as to any material fact and the moving party, WNH, is entitled to judgment as a matter of law. See CR 56(c); Del Guzzi Const. Co., 105 Wn.2d at 882. The evidence and all reasonable inferences are considered in the light most favorable to the non-moving party, Reichlin d/b/a Riverside Roof. See Del Guzzi Const. Co., 105 Wn.2d at 882.

Here, WNH bears the initial burden to show the absence of any genuine issue of material fact. See Young v. Key Parmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). WNH may meet this burden by showing an absence of evidence to support Reichlin's case. See Young,

112 Wn.2d at 225 n.1. A factual dispute does not preclude summary judgment "when reasonable minds could reach but one conclusion from the evidence presented." Central Washington Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 353, 779 P.2d 697 (1989).

If WNH is able to meet its initial burden, the burden shifts to Reichlin to show that there are material issues of fact. See Young, 112 Wn.2d at 225. "A nonmoving party attempting to resist a summary judgment may not rely on speculation, argumentative assertions that unresolved factual matters remain, or in having its affidavits considered at their face value. Halvorsen v. Ferguson, 46 Wn.App. 708, 721, 735 P.2d 675 (1986). Thus, Reichlin must "set forth specific facts that sufficiently rebut [WNH's]

contentions and disclose that a genuine issue as to a material fact exists." See Halvorsen, 46 Wn. App. at 721.

C. Violation of Rules of Professional Conduct

Reichlin's central claim is that WNH committed malpractice because the firm violated the Rules of Professional Conduct by serving as Riverside Roof's general counsel while also representing Frontier Bank, Riverside Roof's major creditor, and while two WNH attorneys owned an interest in and served on the Board of Directors of Frontier Bank. Reichlin maintains that this constituted a conflict of interest under the Rules of Professional Conduct as well as a violation of the Consumer Protection Act. Reichlin claims that these violations resulted in Frontier Bank foreclosing on his loan, his subsequent

bankruptcy, and other damages, including emotional distress.

WNH maintains that no conflict of interest existed because Reichlin never retained the firm as general counsel. WNH asserts that it had represented Riverside Roof previously only in a limited number of matters and that it was not representing Riverside Roof at all when Frontier Bank foreclosed on Reichlin's loans.

The Rules of Professional Conduct are mandatory in character and state a minimum level of conduct for lawyers in Washington. RPC, Preliminary Statement (1990); see also RCW 2.48.230. However, the Rules do not define standards for civil liability. RPC, Preliminary Statement. A breach of duty imposed by the Rules, though not considered

negligence per se, may be considered as evidence of negligence.[3] See RCW 5.40.050.

Under Rule 1.7(a), a lawyer may not represent two clients whose interests are directly adverse to each other. Representation of clients with adverse interests is permitted only if "[t]he lawyer reasonably believes the representation will not adversely affect the relationship with either client; and [e]ach client consents in writing after consultation." RPC Rule 1.7(a)(1) & (2).

Frontier Bank was a longstanding client of WNH. Thus, under Rule 1.7(a) WNH could not undertake representation of Reichlin if WNH's representation would be

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3. WNH argues that Reichlin's claim must fail because he did not submit affidavits from experts stating that WNH breached a duty. However, the Rules set the minimum standard of care for lawyers, thus, expert opinion is not necessary to establish an obvious violation of the Rules.

"directly adverse" to Frontier Bank unless WNH reasonably believed that its representation of Reichlin would not adversely affect its relationship with Frontier Bank. Additionally, both clients would have to consent to the representation after consultation.

We conclude that WNH did not breach RPC 1.7(a) in taking on the representation of Riverside Roof initially. WNH agreed to represent Riverside Roof in a collection matter against a third party, an unfair practice action against a former employee, and several other limited matters. Reichlin does not dispute WNH's assertion that Reichlin used a number of law firms as well as its own in-house counsel. Moreover, all the evidence indicates that WNH represented Riverside Roof in business matters with third

parties, not in Riverside Roof's internal financial matters. Thus, the representation of Riverside Roof in specific matters was not directly adverse to Frontier Bank and no "actual conflict" of interest existed.

Alternatively, Reichlin claims that a "potential conflict" of interest existed. Under Rule 1.7(b) WNH could not represent Reichlin if its representation might have been "materially limited" by its own interests or by its responsibilities to Frontier Bank. The fact that WNH also represented Frontier Bank, Riverside Roof's major creditor, did not in itself "materially limit" its representation of Riverside Roof. Nor does the fact that WNH had a personal interest in Frontier Bank potentially affect its representation of Riverside Roof given the specific

nature of its representation. Thus, Reichlin has failed to raise even a "potential conflict," and WNH had no duty to tell Reichlin that it represented Frontier Bank or that it had an interest in the bank.

Nonetheless, once Frontier Bank asked WNH to represent it against Riverside Root, an actual conflict between Frontier Bank and Reichlin presented itself. At this point, WNH withdrew from its representation of Reichlin. This was not improper. Indeed, it is consistent with the ABA Model Rules of Professional Conduct comments to Rule 1.7 which suggest that if an impermissible conflict exists before representation begins, the representation should be declined. When a conflict arises after representation begins, the lawyer should withdraw. We

conclude that WNH acted properly in withdrawing from presentation of Riverside Roof in the Salter matter.4

Moreover, as the trial court concluded, Reichlin's conflict of interest claim also fails because even if WNH had a conflict of interest and breached its duty to Riverside Roof, the breach would not be the proximate cause of Reichlin's alleged damages.

Proximate cause requires, first, that

4. Reichlin contends that once WNH violated Rule 1.7, violations of Rules 1.3, 1.4, 1.8, 1.9 and 1.10 inevitably followed. A lawyer may not represent someone against a former client in "the same or a substantially related mater," or use "confidences or secrets relating to the representation to the disadvantage of the former client." RPC 1.9 (a) and (b). WNH's representation of Frontier Bank in the foreclosure action does not constitute the "same" or "substantially related matter" element of Rule 1.9 (a). Likewise, Rule 1.9 (b) is not met because WNH's presented affidavits state that it did not use any information it acquired while representing Riverside Roof to Riverside Roof's disadvantage in the foreclosure action and Reichlin presented no evidence to dispute this.
Reichlin's allegations that RPC 1.3, 1.4, 1.8 and 1.10 were violated is controlled by our conclusion that RPC 1.7 and 1.9 were not violated. In addition, Reichlin fails to allege with the necessary specificity a factual basis for the claims.

Proximate cause requires, first, that the alleged breach constitute the cause in fact of the alleged injury. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact refers to the "but for" consequences of an act. Hartley, 103 Wn.2d at 778. Generally, cause in fact is a question for the trier of fact, however, "when the facts are undisputed and inferences therefrom are plain and incapable of reasonable doubt or difference of opinion . . . it becomes a question of law for the court." (citation omitted) Daugert v. Pappas, 104 Wn.2d 254, 257 (1985).

Here, reasonable minds could not disagree that WNH's failure to disclose its representation of Frontier Bank to Reichlin did not cause the foreclosure or Reichlin's filing for bankruptcy and the

damages resulting therefrom. As a matter of law, WNH's conduct is simply too attenuated from the damages to result in liability. Therefore, WNH's breach of its duty was not a cause in fact of Reichlin's damages.[5]

D. Additional Malpractice Claims

In addition to his claim that WNH had an actual or potential conflict of interest, Reichlin contends that WNH committed numerous other acts of legal malpractice.[6]

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5. Likewise, the absence of proximate cause negates Reichlin's contention that WNH withdrew from the Salter case to avoid a conflict of interest and that this withdrawl harmed him. As we have discussed above, the withdrawl was proper. However, regardless of whether the withdrawl was proper, it was not the proximate cause of Reichlin's damages. Rather, the case was dismissed for want of prosecution more than 3½ years after WNH withdrew.

6. Reichlin's claim that WNH violated the Consumer Protection Act (CPA) by representing Frontier Bank in its foreclosure action against him and by failing to disclose its conflict of interest also fails.

To state a claim for legal malpractice, Reichlin must show: that an attorney-client relationship exists, that WNH owed a duty to him, that WNH breached that duty, and that the breach proximately caused Reichlin's injury. See Sherry v. Diercks, 29 Wn. App. 433, 437, 628 P.2d 1336 (1981) (citing Hansen v. Wightman, 14 Wn. App. 78, 88, 538 P.2d 1238 (1975).

A lawyer has a duty to exercise "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." Cook, Flanagan & Berst v. Clausing, 73 Wn.2d 393, 395, 438 P.2d 865

To establish a private cause of action under the CPA, a plaintiff must establish first that the defendant engaged in an unfair or deceptive act or practice. Hangman Ridge Training Stables, Inc. v Safeco Title Ins. Co., 105 Wn.2d 778, 780,719 P.2d 531 (1986); see RCW 19.86. Our conclusions regarding Reichlin's malpractice claim also leads us to conclude that Reichlin fails to satisfy the threshold requirement of an unfair or deceptive act.

(1968).

Among Reichlin's claims of WNH's malpractice are first, WNH's failure to advise Reichlin about Frontier Bank's plans to foreclose on their loans and its failure to advise him to make payments on his home mortgage so that Frontier Bank could not foreclose on its. Reichlin contends that this caused him to lose the opportunity to negotiate with Frontier Bank to delay foreclosure or, alternatively, to sell available assets to prevent foreclosure.

There is no evidence in the record to refute WNH's assertion that Reichlin's financial matters were at all times outside the scope of its representation. Thus, it had no duty to advise Reichlin on how to avoid foreclosure. Nor did Reichlin ever advise WNH of its problems

or ask for advice in this area. Moreover, since Frontier Bank had an absolute right to foreclose on Reichlin's loans, the action Reichlin suggests that WNH should have initiated could not have prevented the foreclosure.

Reichlin also contends that WNH failed to establish or advise Riverside Roof about a lien policy, causing losses on construction projects where no liens were filed, and that WNH failed to advise him to incorporate, causing him to lose personal assets, including his residence.

The only evidence in the record to support Reichlin's allegation that WNH failed to establish a lien policy is Reichlin's bare assertion in his affidavit. Three is no evidence in the record to support Reichlin's allegation that WNH failed to advise Reichlin to

incorporate. Thus, there is an absence of evidence to support either claim. See Young, 112 Wn.2d at 225 n.1. Reichlin may not rely on "argumentative assertions" to resist summary judgment on these claims.[6] See Halvorsen, 46 Wn. App. at 708.

Reichlin also contends that WNH failed to present crucial evidence in the Stark collection case, causing him to lose at trial, and that WNH failed to inform him about a possible claim against the Moses Lake School District.

The statute of limitations for a legal malpractice is three years. Crouch v. Friedman, 541 Wn. App. 731, 735, 754 P.2d 1299 (1988); see RCW 4.16.080(3). The statute of limitations does not start to run until "the client discovers, or in

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7. In addition, it appears that the statute of limitations bars both claims.

the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action." Crouch, 51 Wn. App. at 735 (citing Peters v. Simmons, 87 Wn.2d 400, 406, 552 P.2d 530 (1987).

> While in most cases knowledge, actual or imputed, of the essential elements of the action will probably amount to knowledge of the existence of the cause of action, this is not necessarily so. A plaintiff may well be aware of the facts comprising the essential elements of the action without being aware that he has a legal cause of action.

Reichelt, 107 Wn.2d at 769 (citation omitted).

Reichlin knew immediately of the factual basis for his allegations about the Stark case and the Moses Lake project. Accordingly, these claims are barred by the statute of limitations.

Finally, Reichlin contends that

procedural irregularities at the trial court precluded a fair assessment of his claims. WNH states that if there were any irregularities, subsequent court action cured them and Reichlin was not prejudiced.

First, Reichlin asserts that the trial court erred in relying on Graafstra's affidavit because the Reichlin and Dixon affidavits and WNH billing sheets indicate that Graafstra's affidavit contains false information. All of these documents are before this court, thus, this court can make a decision about credibility.

Second, Reichlin contends that the trial court's order on summary judgment did not list the Supplemental Affidavit of Leonard Reichlin. While this contention is accurate, the trial court order denying

reconsideration and affirming summary judgment lists this affidavit. Thus, the affidavit is properly a part of the record before this court.

Third, Reichlin argues that the court erred in considering WNH's reply memorandum because it was filed 5 hours after the summary judgment hearing. WNH maintains that it filed the memorandum on time. However, even if the memorandum was late, departures from court rules are not reviewable unless the complaining party was injured. Snyder v. State, 19 Wn. App. 631, 637, 577 P.2d 160 (1978). Reichlin filed an answer to this memorandum, thus, he was not injured.

In conclusion, WNH did not breach its duty to Reichlin when it agreed to represent Riverside Roof initially or by subsequently withdrawing from its

representation of Riverside Roof in the Salter case and representing Frontier Bank in its foreclosure action against Reichlin's properties. Moreover, Reichlin failed to make a prima facie case that any damages suffered by him were proximately caused by WNH.[7] The trial court did not err in granting summary judgment for WNH.

Affirmed.

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8. Reichlin claims that WNH's actions caused him extreme emotional distress and loss of business opportunities. Reichlin cites no authority for either claim.

APPENDIX E

THE SUPREME COURT OF WASHINGTON

LEONARD REICHLIN and JUDY D. REICHLIN,	)	No. 57779-0
Petitioners,	)	ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW AND PETITION FOR REVIEW
v.	)	
WILLIAMS, NOVACK & HANSEN, et al.,	)	
Respondents.	)	

This matter came before Department II of the Court on its March 5, 1991, Motion Calendar on Petitioners' Motion for Extension of Time to File Petition for Review. Department II having considered the motion and files herein;

Now, therefore, it is hereby

ORDERED;

That Petitioner's Motion for Extension of Time to File Petition for Review is granted and the Petition for Review is denied on the merits.

Dated at Olympia, Washington this 5TH day of March, 1991.

Chief Justice Dore